IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v.

Case No. 5D18-3726
5D18-3727

PAUL THORNTON,

Appellee.

_____/

Opinion filed December 27, 2019

Appeal from the Circuit Court
for Orange County,
Gail A. Adams, Judge.

Ashley Moody, Attorney General, Tallahassee, and Deborah A. Chance, Assistant Attorney General, Daytona Beach, for Appellant.

James S. Purdy, Public Defender, and Mark Alexander Williams, Assistant Public Defender, Daytona Beach, for Appellee.

LAMBERT, J.

In these consolidated appeals, the State of Florida challenges the trial court's orders entered in two cases below granting Appellee's motion to suppress a firearm, certain illicit drugs, and drug paraphernalia that were confiscated by law enforcement following a warrantless search of his truck. As we explain below, we reverse the

suppression orders for two reasons. First, the trial court erred in finding that Appellee's vehicle was parked in the curtilage of his residence. Second, the deputy sheriff's body camera video admitted into evidence at the suppression hearing shows that the crack cocaine located in the interior of Appellee's truck was plainly and openly observable. Thus, the deputy had probable cause to conduct a warrantless search of the truck under the "automobile exception" to the warrant requirement of the Fourth Amendment to the United States Constitution[1] and to seize the crack cocaine, as well as the firearm and other contraband he also found during the course of his search.

FACTS—

On the evening of February 10, 2018, two deputy sheriffs from the Orange County Sheriff's Office separately arrived at Appellee's residence to arrest him for aggravated assault with a firearm pursuant to a warrant that had been executed earlier that day by a circuit judge. The deputies knocked on the front door of the home. A woman opened the door and, in response to their inquiry, advised the deputies that Appellee did not live there.

As the deputies prepared to leave, a truck pulled into an open lot by the residence. One of the deputies noted that the truck matched the description in the arrest warrant given by the victim of the aggravated assault. The other deputy recognized Appellee from his picture on the warrant. There were no other persons in the truck. Based upon the nature of the crime charged in the arrest warrant, the deputies ordered Appellee out of his truck at gunpoint. One of the deputies would later testify that, prior to exiting the truck,

[1] Amend. IV, U.S. Const. "The Fourth Amendment to the United States Constitution protects the rights of people to be free of unreasonable searches and seizures . . . ." *McGraw v. State*, 44 Fla. L. Weekly S263, S264 (Fla. Nov. 27, 2019).

Appellee began making furtive movements as if he was trying to conceal something under the driver's seat. When Appellee stepped out of his vehicle, he was secured in handcuffs and placed in the back of one of the patrol cars.

One of the deputies then returned to Appellee's truck and, while standing outside, used a flashlight to illuminate the truck's interior. This deputy would testify at the suppression hearing that he saw a clear plastic container "in plain sight between the driver's seat and the center console." Inside this container was a white, rock-like substance partially cut into bars or chunks that was visible through the clear container. The deputy testified that, from his training and experience, he recognized the contents of the container to be crack cocaine.

Based on this observation, the deputy opened the door to the truck and seized the container. He then searched the remainder of the vehicle and found a loaded firearm under the driver's seat, more crack cocaine in a sandwich bag in the center console, and a small amount of marijuana. Appellee was subsequently charged with possession of cocaine, possession of twenty grams or less of marijuana, and possession of drug paraphernalia.[2] He was charged in a second case with possession of a firearm by a convicted felon and possession of ammunition by a convicted felon.

THE MOTION TO SUPPRESS AND THE TRIAL COURT'S RULING—

Appellee filed a motion to suppress the firearm and the contraband seized from his truck. He first argued that his truck was parked on the curtilage of his residence, which is afforded constitutional protection against unreasonable searches and seizures under

[2] The drug paraphernalia is the plastic container holding the crack cocaine.

the Fourth Amendment. *See Collins v. Virginia*, 138 S. Ct. 1663, 1671 (2018) (holding that the automobile exception to the warrant requirement under the Fourth Amendment does not give a law enforcement officer the right to enter the curtilage of a person's residence to access his vehicle without a warrant). Appellee thus asserted that the deputy's warrantless search of his truck situated inside the curtilage violated both his Fourth Amendment right and his right to privacy in the items located in his truck.

Appellee and the deputy who seized the items from Appellee's truck were the only two witnesses to testify at the suppression hearing. Also introduced into evidence was the deputy's body camera video showing the unpaved parking area where Appellee's truck was situated and where the arrest took place. This area was surrounded by several residences, including Appellee's. The video also depicted the deputy shining his flashlight into Appellee's truck, thus illuminating what the deputy was able to observe through the window before he opened the truck door. A photograph of the parking area, which included the location of Appellee's parked truck, was admitted into evidence as well.

Following the presentation of the evidence and argument of counsel, the trial court orally announced its findings. Pertinent here, the court first found that the truck "was parked in a posted private parking for the home, which is curtilage." It also found that "the contents of the truck were not in plain view, as shown by video."[3] The trial court thereafter

[3] The State had also presented testimony at the hearing that Appellee had given consent to the deputies to search his truck. The trial court found that Appellee did not give the deputies authority to search his vehicle. The State has not challenged this finding here.

entered identical, unelaborated orders in each case below granting Appellee's motion to suppress, from which the State has timely appealed.[4]

STANDARD OF REVIEW—

"A trial court's ruling on a motion to suppress evidence presents a mixed question of law and fact." *Davis v. State*, 257 So. 3d 1159, 1161 (Fla. 1st DCA 2018) (citing *Connor v. State*, 803 So. 2d 598, 608 (Fla. 2001)). An appellate court defers to a trial court's findings of fact, provided that they are supported by competent substantial evidence. *Pagan v. State*, 830 So. 2d 792, 806 (Fla. 2002) (citing *Butler v. State*, 706 So. 2d 100, 101 (Fla. 1st DCA 1998)). However, such deference "does not fully apply when the findings are based on evidence other than live testimony." *Parker v. State*, 873 So. 2d 270, 279 (Fla. 2004) (citing *Thompson v. State*, 548 So. 2d 198, 204 n.5 (Fla. 1989)); *see also Black v. State*, 59 So. 3d 340, 344 (Fla. 4th DCA 2011) ("[T]o the extent that the trial court's findings are based on viewing the interrogation DVD, which this court of course has also viewed, we utilize a much less deferential standard."). Finally, the trial court's application of law to the facts of the case is reviewed de novo. *Murphy v. State*, 898 So. 2d 1031, 1033 (Fla. 5th DCA 2005) (citing *Phuagnong v. State*, 714 So. 2d 527, 529 (Fla. 1st DCA 1998)).

WAS APPELLEE'S TRUCK LOCATED IN THE CURTILAGE?—

The trial court's first determination made in granting the motion to suppress was that Appellee's truck was parked in the curtilage of his home when it was searched by the deputy. Curtilage is defined as "the land or yard adjoining a house, usually within an

[4] The parties stipulated that the motion filed in each case was dispositive.

enclosure." *Curtilage*, Black's Law Dictionary (10th ed. 2014). "The central inquiry in determining if an area constitutes curtilage is whether the area harbors the 'intimate activity associated with the "sanctity of a man's home and the privacies of life."'" *Davis*, 257 So. 3d at 1161 (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

To determine the scope of the curtilage of a particular residence, a court must analyze and consider the following four factors:

> [1] the proximity of the area claimed to be curtilage to the home, [2] whether the area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.

Wheeler v. State, 62 So. 3d 1218, 1220 (Fla. 5th DCA 2011) (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987)). Of these four factors, only the first factor supports the trial court's conclusion that the truck was located in the curtilage because the testimony showed that Appellee's truck was parked approximately twenty feet from his residence.

As to the other three factors, the evidence presented at the suppression hearing was that the unpaved parking lot for this housing complex where Appellee's residence was located is not within a fenced or enclosed area.[5] Next, the lot was used as a parking area, rather than an area for any private, domestic activities or activities otherwise associated with the sanctity of a home.[6] Finally, Appellee made no effort to conceal the

[5] We have viewed the video and photograph admitted into evidence below showing the location of Appellee's truck, the unpaved parking area, and the surroundings at the time of the search.

[6] The video shows that the "posted" sign orally described by the trial court was not located on this or any parking space in the unpaved lot. It was affixed to Appellee's residence. Because the residence was twenty feet from where Appellee's truck was located, the sign could not be reasonably understood to mean that the particular parking spot was private.

area from observation by the public. *See Davis*, 257 So. 3d at 1162 (holding that an unpaved parking area was not curtilage because although the defendant's vehicle was only twenty feet from the residence, the area was not fenced in, it was used only for parking, and the owner made no effort to conceal it from observation from the public).

Accordingly, we hold that the trial court's conclusion that Appellee's truck was parked in the curtilage, and thus situated within a constitutionally-protected area, was error. *See Shannon v. State*, 252 So. 3d 358 (Fla. 2d DCA 2018).

SEARCH OF APPELLEE'S TRUCK—

In granting Appellee's motion to suppress, the trial court also found that "the contents of the truck were not in plain view, as shown by the video." The court's subsequent written order did not explain whether it was referring to all of the contraband and the firearm found by the deputy in Appellee's truck not being in plain view or whether it was simply reflecting the court's disagreement with the deputy's testimony that the clear plastic container with the crack cocaine was in "plain sight between the driver's seat and the center console." Regardless, and for the following reasons, we conclude that the trial court erred in suppressing the contraband and firearm seized by the deputy from Appellee's truck.

We have viewed the video of the deputy's search of Appellee's truck that was admitted into evidence below. As such, we give less deference to the factual findings made by the trial court that are based on its observation of this same video. *See Black*, 59 So. 3d at 344. To the extent that the trial court's finding that the contents of the truck were not in plain view relates to the clear plastic container with the white, rock-like substance situated on the driver's seat, this finding is not supported by competent

substantial evidence. Put differently, the video shows that the container and its contents that were located on the driver's seat of Appellee's truck were readily and plainly observable to the deputy as he stood outside the truck looking in with his flashlight.[7]

The deputy testified at the hearing that, based upon his training and experience, the substance that he observed in open view in the container in Appellee's truck was crack cocaine. *See State v. Fischer*, 987 So. 2d 708, 712 (Fla. 5th DCA 2008) ("Based on an officer's training and experience, the incriminating nature of a substance in open view may be determined by the officer's visual observation and identification of the substance."). The law does not require that a law enforcement officer know with certainty that the item or substance is contraband in order for there to be probable cause that a crime is being committed in the officer's presence. *See State v. Walker*, 729 So. 2d 463, 464 (Fla. 2d DCA 1999) ("In determining whether the incriminating nature of the evidence is immediately apparent, police are not required to know that an item is contraband." (quoting *State v. Futch*, 715 So. 2d 992, 993 (Fla. 2d DCA 1998))).

Based upon his observations, training, and experience, the deputy had probable cause to believe that Appellee had committed the felony of possession of crack cocaine. At this point, under what is referred to as the "pre-intrusion" category of the "open view" doctrine described in *Ensor v. State*, 403 So. 2d 349, 352 (Fla. 1981), he had the authority to search Appellee's truck. In *Ensor*, the court addressed the legality of a search of the defendant's vehicle by a law enforcement officer who, following a valid traffic stop,

[7] That the container and substance were in open view as a result of the deputy's use of a flashlight raises no constitutional concerns. *See Roberts v. State*, 566 So. 2d 848, 850 (Fla. 5th DCA 1990) ("It is well established that the use of a flashlight to illuminate the interior of a vehicle does not violate Fourth Amendment rights . . . .").

observed through the front windshield of the vehicle what appeared to be a firearm protruding from under the left side of the passenger floormat. *Id.* at 351. The court explained that, in these circumstances, when a law enforcement officer is standing outside a vehicle located in a non-constitutionally-protected area, and sees, in open view, the partially-concealed firearm located inside the vehicle, a constitutionally-protected area, the officer had probable cause to believe that the felony of possessing a concealed firearm was being committed in his presence and could thus search the vehicle. *Id.* at 353.

However, the court cautioned that, before entering the vehicle to seize the firearm, either the officer must obtain a search warrant or there must be some exception to the Fourth Amendment's warrant requirement to justify a warrantless entry in the vehicle. *Id.* The court held that the officer's warrantless search and seizure was clearly reasonable under the automobile exception to the warrant requirement. *Id.* This exception recognizes that an officer's warrantless entry under the circumstances is constitutionally permitted due to the exigency of a movable vehicle. *Id.* (citing *Albo v. State*, 379 So. 2d 648, 650 (Fla. 1980)).[8]

Returning to the present case, as we have previously indicated, the trial court erred because, first, Appellee's truck was not located in the constitutionally-protected curtilage of his residence at the time of the search and, second, the crack cocaine situated on the driver's seat of the truck was in open view. Thus, we conclude that the deputy had

[8] The application of the automobile exception for a warrantless search of a vehicle has also been based on the rationale that a person possesses a reduced expectation of privacy concerning the contents of an automobile. *See State v. Green*, 943 So. 2d 1004, 1006 (Fla. 2d DCA 2006) (citing *California v. Carney*, 471 U.S. 386, 390–93 (1985)).

probable cause to search Appellee's truck and that, under the aforementioned automobile exception, he properly entered the truck without a warrant to seize the clear container with the crack cocaine, even though Appellee had already been arrested. *See Pennsylvania v. Labron*, 518 U.S. 938, 939–40 (1996) (recognizing that when probable cause exists that the vehicle contains contraband, the automobile exception to the warrant requirement permits police to search the car, even though the owner of the vehicle was arrested and the vehicle was parked).

Lastly, we hold that upon the deputy seizing the crack cocaine from the driver's seat, his continued search of Appellee's truck and his subsequent seizure of the additional contraband and the firearm found in the truck during the search were constitutionally permissible. *See State v. Ross*, 209 So. 3d 606, 608–09 (Fla. 2d DCA 2016) (reversing trial court's order suppressing evidence seized by law enforcement resulting from a warrantless search of the defendant's vehicle following arrest because, once the sergeant observed through the car window a "half-cookie" of crack cocaine in open view, the automobile exception to the warrant requirement authorized the search and seizure, and the sergeant's continued search of the vehicle thereafter led to the discovery of powder cocaine and additional crack cocaine within the vehicle).

Accordingly, we reverse the trial court's order granting Appellee's dispositive motion to suppress in the two cases below and remand for further proceedings.

REVERSED and REMANDED.

ORFINGER and TRAVER, JJ., concur.